TOWARD A MORE EFFECTIVE USE OF BATSON IN VIRGINIA CAPITAL TRIALS

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nothing in the rule implies that a variation in the argument urged in support of a claim should result in default. Still, that was the interpretation embraced by the Supreme Court of Virginia in Goins and Clagett. Together, these two cases add yet another default trap to Virginia’s procedural minefield. Now, defense counsel must take certain steps to preserve the record which were unnecessary only a year ago. Apparently, attorneys must now take the time, when objecting, to advance every conceivable argument. Also, counsel should renew objections and motions during trial to proffer new grounds whenever necessary. Naturally, proceeding with such painstaking caution will result in some delay at trial. Hence, counsel may want to inform the court that the delay is necessary in light of the Goins and Clagett rulings.

X. No Showing Of Prejudice

The question of whether it is error to deny a defendant experts or other resources has recently been deflected by language pointing out that the defense made no showing of prejudice. For example, in Barnebei v. Commonwealth, the Supreme Court of Virginia held that the trial court did not err in denying the defendant’s motion for an expert. In Barnebei, the trial court ruled that the defendant failed to make the particularized showing necessary to entitle him to the appointment of a forensic pathologist. The Supreme Court of Virginia, hearing the case on direct appeal, held there was no error because the record did not show that the defendant was prejudiced by the denial. Apparently, the defense experts in a variety of specialties, particularly where the Commonwealth’s evidence involves important expert testimony.

XI. Conclusion

To defend a capital case and simultaneously preserve the record for appeal is a Herculean task—particularly when the Supreme Court of Virginia continues to change the rules of the game. But the legal battlefield is littered with the actual bodies of those who did not get through the procedural minefield. That fact alone means that every effort must be made to achieve some sort of meaningful appellate review.

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6 The peremptory strike is 600 years old. (15th ed. 1809).
7 The Supreme Court of Virginia now wants the trial record to reflect why the defendant was harmed by the lack of expert assistance.
8 When a pre-trial motion for expert assistance is denied, defense counsel should make it clear on the record that prejudice has resulted from denial of the motion. As a practical matter, this course of action creates difficulty because counsel has no way to forecast, before an expert is appointed, how a trial might be different with expert assistance. Counsel may, however, make a post-verdict proffer. Once the trial has concluded, counsel may point to particular incidents during the trial where the defendant was prejudiced because he had no expert. For example, counsel may have been unable to cross-examine the Commonwealth’s expert on particular subjects due to a lack of technical expertise. When making the post-verdict proffer, counsel should be as specific as possible, detailing particular testimony and evidence to argue that prejudice resulted from the court’s denial of expert assistance.

96 Id. at 170-71, 477 S.E.2d at 275-76. Before trial, defense counsel filed a motion for a court-appointed forensic pathologist based upon Ake v. Oklahoma, 470 U.S. 68 (1985), which held that the Constitution requires appointment of a competent, independent psychiatrist to assist the defense. The Ake rationale has been extended to require provision of forensic pathology services.
97 Id.
98 Id.
theoretical justifications for the two competing doctrines. The peremptory challenge has traditionally been based on the common law’s respect for irrationality: a party could strike a juror for irrational reasons, no reason, or just based on a “hunch.” The Equal Protection clause, on the other hand, demands rationality. The result of this uneasy coexistence has been a somewhat confused jurisprudence and the inconsistent application of the doctrine across jurisdictions.

The complexity of the jurisprudence, however, should not discourage Virginia practitioners. The actual mechanics of making a Batson claim at the trial level are very simple. A comparison of Virginia Batson litigation with that of other “death belt” states suggests that Virginia practitioners could perhaps be more aggressive and creative in pursuing Batson claims. Although the holding in Batson has now been applied in other contexts, this article will primarily discuss the implications of Batson to racial discrimination. This limited scope is due to the fact that Batson claims in Virginia are more likely to involve race than any other factor. Thus, all examples are race-based. The intent of this article is to inform Virginia defense counsel of the basics of Batson procedure and substantive law (Section II); to survey the current state of Virginia Batson jurisprudence, especially in the Court of Appeals of Virginia and Supreme Court of Virginia (Section III); and, finally, to examine some cases from other jurisdictions which may hold valuable lessons for Virginia Batson practice (Section IV).

II. BASIC BATSON FRAMEWORK: THE RULES OF ENGAGEMENT

In Swain v. Alabama, the United States Supreme Court addressed the issue of purposeful discrimination in the use of peremptory challenges. The “essential nature” of the longstanding policy allowing unrestricted peremptory challenges, said the Court, was to protect against jury impartiality, therefore the challenge could be exercised “without a reason stated” and “without being subject to the court’s control.” Furthermore, due to the limited amount of information the defendant and prosecution can gather regarding potential jurors, the Court noted that peremptory strikes have long been allowed on “grounds normally thought irrelevant to legal proceedings,” including the “race, religion [and] nationality” of the potential jurors.

Although the importance of the inherently irrational nature of the unrestricted peremptory challenge was noted in Swain, the Court nevertheless held that any “purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice would] violate the Equal Protection Clause.” The Court presumed, however, that prosecutors used their peremptory challenges “to obtain a fair and impartial jury to try the case before the court.” Consequently, in order to show purposeful discrimination, the defendant had to demonstrate that the prosecutor’s use of peremptory challenges was for “reasons wholly unrelated to the outcome” of the case and simply for the purpose of denying blacks their constitutional right to serve on the jury.

Thus, only if the defendant was able to show that the prosecutor had repeatedly engaged in systematic exclusions of blacks could he demonstrate that the prosecutor had violated the Constitution. As shown by cases in the years following Swain, this burden was nearly impossible to meet.

Because the Swain test had basically immunized prosecutors from the courts’ scrutiny, the United States Supreme Court, in Batson v. Kentucky, revisited the issue. The Batson Court held that because a “single invidiously discriminatory governmental act” violates the safeguards found in the Equal Protection Clause of the Fourteenth Amendment, “a consistent pattern of facial discrimination” is not a prerequisite to concluding that a defendant’s constitutional rights were abridged. Hence, by allowing a defendant to establish purposeful discrimination in an individual case “Batson went further than easing Swain’s evidentiary burden; it undercut Swain’s substantive holding by barring race-based peremptories even when exercised for trial-related matters.”

The Batson prima facie test states:

[T]he defendant must first show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant’s race. Second, the defendant is entitled to rely on the fact . . . that peremptory challenges . . . permit[] “those to discriminate who are of a mind to discriminate.” Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

If the defendant makes the requisite showing, a presumption that the prosecutor acted with discriminatory intent is created. To rebut this presumption, the prosecutor must produce nondiscriminatory reasons for his challenges. The Court emphasized that the proffered reasons did not have to “rise to the level of justifying exercise of challenge for cause,” but the prosecutor could not merely state that “he challenged jurors of the
defendant’s race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race.” 24 Likewise, the prosecutor cannot simply deny that he exercised his peremptory strikes for a nondiscriminatory reason; he must “articulate a neutral explanation related to the particular case to be tried.” 25 If the prosecutor proffers a reason the trial court determines is legitimate, i.e. one that did not “deny equal protection,” the discriminatory presumption is rebutted and no constitutional violation exists. 26

Although the Batson Court noted the importance of the peremptory challenge in the administration of justice, it rejected the state’s argument that this decision would “eviscerate the fair trial values” of such challenges. 27 Because peremptory challenges have been used to exclude individuals solely on the basis of their race, the Court stated that its holding would enforce “the mandate of equal protection and further[ ] the ends of justice.” 28 The Court declined to adopt specific procedures to be followed by the trial court when a defendant has made a timely objection to a prosecutor’s use of a peremptory challenge, but it emphasized that no black citizen should be disqualified simply on the basis of the color of his skin. 29

Although the Batson decision specifically addressed the issue of a prosecutor’s discriminatory use of peremptory challenges against black jurors, the Court has since revisited, and expanded, that holding. In Powers v. Ohio, 30 the Court, holding that an “individual juror does not have a right to sit on any particular jury, but he or she possess the right to not be excluded from one on account of race,” recognized that the discriminatory use of peremptory strikes violates the equal protection rights of the stricken juror, not just those of the defendant. 31 In Georgia v. McCollum, 32 the Court concluded that the peremptory strike restraints apply to the criminal defendant, as well as to the prosecution. 33 The final expansion, to date, came in J.E.B. v. Alabama. 34 In J.E.B., the Court held that gender-based peremptory challenges also violated the protections found in the Constitution. 35 Although some lower courts have expanded the Batson protections further, 36 the United States Supreme Court has yet to follow suit. Nevertheless, Batson and its progeny make it clear that any discriminatory use of peremptory strikes based on the juror’s race or gender will not be excused.

III. VIRGINIA BATSON: UNPLOWED GROUND

A. Race-Neutral Reasons

Judge Benton wrote in dissent in 1993 that the Court of Appeals of Virginia “sends the message that in Virginia any reason will suffice to remove African-Americans from juries so long as the prosecutor does not admit on the record race as the reason and the trial judge blindly accepts the prosecutor’s assertion that race was not the reason.” 37 Unfortunately, an unscientific survey of Virginia Batson cases lends empirical support to his statement. In twenty-seven Court of Appeals and Supreme Court of Virginia cases, the courts found that a proffered reason for a strike was either not race-neutral or was pretextual in only five cases. At first glance, five “successful” cases out of twenty-seven may seem significant for this type of claim, but of those five cases, one was based on gender, not race, discrimination; 38 two were civil, not criminal, cases; 39 and one was a ruling that a black defendant had violated Batson. 40 Thus in only one case out of the twenty-seven was a criminal defendant granted relief because the prosecutor’s proffered race-neutral reason was unsatisfactory. 41 (As discussed below, however, some defendants were granted relief based upon procedural defects in the trial court’s handling of their Batson objections).

One of the primary reasons for the limited success of Batson claims has been the great deference shown to trial court judges on appeal. A trial court’s decision on discriminatory intent is accorded great deference and will not be overturned unless clearly erroneous. 42 Likewise, Virginia trial judges seem to give Commonwealth attorneys wide latitude in offering race-neutral reasons for their strikes. Strikes of black jurors have been upheld because the prosecutor asserted that the jurors were too young, too old, unemployed, underemployed, had a limited education, were from a high-crime neighborhood, did not have children, were related to persons convicted of crimes, were not attentive enough, were employed in jobs which made them inherently


24 Id.
25 Id. at 98. The Court emphasized that the prosecutor was required to “give a ‘clear and reasonably specific’ explanation of his ‘legitimate reason’ for exercising the challenges.” Id. at 98 n.20b (quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981)).
27 Batson, 476 U.S. at 98.
28 Id. at 99.
29 Id.
31 Id. at 409. Like Batson, the holding in Powers applies to gender as well as race. See discussion of Georgia v. McCollum, supra.
33 Id. at 56.
34 114 S. Ct. 1419 (1994).
35 Id. at 1422.
36 See, e.g., United States v. Ruiz, 894 F.2d 501, 506 (2d Cir. 1990) (holding that Hispanics are cognizable group under Batson); Commonwealth v. Rico, 662 A.2d 1076, 1079 (Pa. Super. Ct. 1995) (holding that Italian-Americans are cognizable group under Batson); Cerrone v. People, 900 P.2d 45, 55 (Colo. 1995) (holding that exclusion of “hourly wage earners, as a group” from grand jury service was “inherently discriminatory”).
43 Id. at 61, 467 S.E.2d at 848.
45 Goodson, 22 Va. at 61, 467 S.E.2d at 848.
46 Id.
51 Id.
prosecutor must give a "clear and reasonably specific" explanation of his
intent on the part of the party exercising the strike. The "discriminatory
impact" argument is not completely toothless, however. It simply needs
more, such arguments are given short shrift by Virginia courts. This is
because the burden is on the party objecting to prove discriminatory intent
on the part of the party exercising the strike. The "discriminatory impact"
argument is not completely toothless, however. It simply needs
evidence to buttress it. A prosecutor should not be allowed to use

exercised strikes against the young white men on the jury. The trial court
overruled the objection and the defendant was convicted. On appeal, the
Court of Appeals held that "after the Commonwealth has asserted a
facially race-neutral reason to strike, but has only struck jurors of one
race and the reason asserted for the strike is equally applicable to other
members of the venire of a different race, the reason asserted is not a
satisfactory race-neutral explanation for the Commonwealth's strikes." 65
Consequently, the defendant's prima facie case stood unrebutted and the
conviction was reversed and remanded for new trial. 66

Of course, in the heat of voir dire, it is difficult to keep an accurate
running record of the characteristics shared by those jurors struck
peremptorily and those retained. This difficulty is especially so if the
characteristics are not "visible" characteristics, such as when a prosecu-
tor strikes a juror because of a familial relationship with a person
convicted of a crime or because he lives in a high-crime neighborhood.
One method overburdened defense attorneys might use for gathering
Batson evidence is to have a paralegal or volunteer take down the
classifications of all voir dire members when they are being questioned
in court (or earlier, if possible). Another method might be to try to include
demographic and background information on a jury questionnaire.
In either case, such evidence can be vital when later evaluating how the
prosecutor treated similarly situated, but racially dissimilar, jurors. In
addition to an uneven pattern of striking such jurors, the nature and extent
of voir dire examination may also be an indication of pretext. For instance,
if the prosecutor asked only the black jurors where they lived, or
asked only the black jurors if they had relatives who had been
convicted of crimes, this uneven questioning is evidence that the pro-
ferred reason was pretextual. Counsel should incorporate such evidence
into their objections for the record, or their arguments may be de-
faulted. 68

When confronted with an explanation from the prosecutor that seems pretextual, defense counsel may be tempted to argue simply that
the prosecutor’s strikes had a disproportionate impact on blacks. Without
more, such arguments are given short shrift by Virginia courts. This is
because the burden is on the party objecting to prove discriminatory intent on the part of the party exercising the strike. The "discriminatory impact"
argument is not completely toothless, however. It simply needs
evidence to buttress it. A prosecutor should not be allowed to use

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53 Id.
55 Id.
57 Batson seems to require that the prosecutor’s proffered reason be related to the facts of the case, but it is not entirely clear from the opinion whether this requirement was dicta or a part of the holding. The Court stated that if "general assertions were accepted as rebutting a defendant’s prima facie case, the Equal Protection Clause ‘would be but a vain and illusory requirement.’ The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried." 476 U.S. at 98 (citations omitted). Additionally, in a footnote, the Court stated that "the prosecutor must give a ‘clear and reasonably specific’ explanation of his ‘legitimate reasons’ for exercising the challenges. Id. at 98 n.20 (citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 258 (1981)).
65 Id. at 285, 429 S.E.2d at 471.
66 Id.
67 Counsel should note that Batson motions must be made before the
jury is sworn, otherwise they may be made only by leave of the court. Va.
Code § 8.01-352.
69 Id.
stereotypes (such as people from high-crime neighborhoods are more tolerant of crime) to eliminate black jurors. Later, this article will discuss how defense counsel in other jurisdictions have successfully made such arguments. The point to remember is that there must be some evidence that the disproportionate impact is the direct result of discriminatory intent.

B. Procedure

In addressing the substance of Batson claims, Virginia courts are bound, of course, to the basic federal framework described in Section II of this article. There are some individual procedural differences, however, that should be kept in mind.

1. When the Batson Motion May be Made

In Virginia felony trials, the jury is chosen from a panel of twenty by having the Commonwealth and the defendant "alternately strike off one name from the panel until the number remaining" is reduced to twelve. Generally, Batson motions must be made before the jury is sworn; however, such motions may be made after the jury has been empaneled with the leave of the court. In one case, the trial court was held to have implicitly granted such leave when it ruled on defense counsel’s oral Batson motion made after the jury was sworn. A court may also choose to defer its ruling on a Batson motion and order that the venire be restruck.

2. Establishing the Prima Facie Case

Although Virginia courts have exhibited occasional confusion over what constitutes a prima facie case, it is most often articulated simply as a "showing that the prosecution has exercised peremptory strikes on the basis of race." Virginia courts have shown a considerable willingness, however, to waive the requirement of proving a prima facie case whenever the prosecutor attempts to explain the reasons for his strikes before the trial judge has ruled that a prima facie case has been made.

3. Rebuttal of Prima Facie Case and Pretextual Rulings

Once a prima facie case of Batson discrimination has been established, the trial court is obligated to question the prosecutor as to his motives. If the court refuses to do so, the defendant’s case remains unrebuted, and the court’s refusal is reversible error. Likewise, once a race-neutral explanation is offered, the trial court must make a ruling. Failure to do so is error requiring remand. However, in one case, the Supreme Court of Virginia avoided the consequences of this rule by finding that the trial court had “implicitly” ruled that the proffered explanations were pretextual when it found that they were facially neutral. Thus, the court combined the second and third steps of the Batson analysis into one finding. The lesson for Virginia counsel is to always get a ruling for the record whenever evidence is offered that the proffered reasons are pretextual.

4. Appeals and Remedies

As with all aspects of Virginia litigation, counsel must be careful when making Batson claims to avoid default and preserve the record. In Buck v. Commonwealth, the prosecution struck one black juror because he supposedly was from a high-crime neighborhood and another because she had no children. At trial, the defendant objected on the ground that these explanations were pretextual because of their disproportionate impact. On appeal to the Court of Appeals of Virginia, his conviction was reversed. On rehearing en banc, the conviction was reinstated. Both rulings were on the merits. On further appeal to the Supreme Court of Virginia, the Commonwealth alleged for the first time that the defendant was procedurally barred because the arguments he made on appeal were different than the “disproportionate impact” argument made at trial. The Supreme Court of Virginia agreed and refused to hear the defendant’s “new” arguments. Thus counsel must always attempt to include every conceivable argument at the trial level or face the procedural bar at the appellate level.

The remedy for a Batson violation in most cases is remand for a new trial. However, Batson claims are susceptible to harmless error analysis. Thus, if a juror is struck based on two different grounds, only one of which is later found to violate Batson, the remaining ground may be sufficient to uphold the conviction.

IV. A BROADER BATSON AGENDA

A. Creating an Adequate Record

As was illustrated in Part III, the Supreme Court of Virginia and the United States Court of Appeals for the Fourth Circuit rarely overturn a trial court’s finding that a prosecutor’s proffered race-neutral reason for his strike was satisfactory. Because of this “rubber-stamp” approach, a defendant’s best chance for success on a Batson claim is at the trial level.

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72 Id.
76 Id.
83 Buck v. Commonwealth, 247 Va. 449, 453, 443 S.E.2d 414, 416 (1994). However, the court did conclude that even though it would not consider Buck’s new arguments, it could review the trial court’s determination of a racially neutral explanation under a “clearly erroneous” standard. It found no error. Id.
If defense counsel believes that the prosecution has used a peremptory challenge in an unconstitutional manner, a *Batson* motion should be made. Although it may not be required, the best approach is to make the motion in writing. In most instances, the *Batson* motion must be made before the jury is sworn; consequently, counsel should address the court as soon as the selection of the petit jury is revealed.

If the court grants the defendant’s motion (establishing a prima facie case), counsel may then press for an evidentiary hearing in which the prosecutor, and possibly other witnesses, will be examined. As is generally true in motions practice, evidence is better than argument alone. Although *Batson* does not require an evidentiary hearing of this type, counsel may argue that, based on the facts in the particular case, such a hearing is warranted. Likewise, even though the courts have held that an ex parte consideration of the prosecutor’s explanation is necessary in some instances, the court, in *United States v. Garrison*, emphasized that “the important rights guaranteed by *Batson* deserve the full protection of the adversarial process except where compelling reasons requiring secrecy are shown.” Hence, counsel should urge the court to require the Commonwealth to “make a substantial showing of necessity to justify excluding the defendant from this important stage of the prosecution.”

If the *Batson* motion is denied, defense counsel must still take the necessary steps needed to introduce adequate evidence into the record. For example, counsel might actively seek to introduce demographic data and information regarding the composition of the venire, the stricken venirepersons, the resulting jury, the parties and their attorneys. If possible, this information should be presented to the trial court in the form of exhibits to ensure its inclusion in the record. Additionally, counsel should request that the prosecutor produce any notes regarding the venire for the court’s inspection.

Regardless of the trial court’s ruling on evidentiary hearing requests, ex parte consultation of prosecutor responses, or other rulings, counsel should focus on preserving the record. By creating as detailed a record as possible, counsel will likely force: (1) the trial court to consider all of the relevant circumstances before concluding that the prosecutor’s proffered reason is not pretextual; (2) the appellate court to consider more closely whether the trial court’s decision was “clearly erroneous”; and (3) the prosecutor to be more careful in his discriminatory use of his peremptory strikes. Although creating a detailed record in no way assures that the courts will find more *Batson* violations, at the very least, it ensures that the prosecutor’s and trial judge’s actions are recorded.

### B. Making the Prima Facie Case

Although the *Batson* Court gave two examples of circumstances that could support an inference of discrimination, it held that the trial court must, looking at “all relevant circumstances” in each individual case, determine if the defendant had established the requisite showing necessary to make out a prima facie case. Since *Batson*, the courts have elaborated on the types of circumstances in which the evidence may establish the necessary inference of discrimination needed for a prima facie case. These circumstances include, but are in no means limited to: striking every African American from the venire; excluding a significant percentage of African American venirepersons; the type and duration of the non-movant attorney’s questions and statements during voir dire; repeated history of discrimination by county DA’s office; and, disparate treatment of members of the venire with same characteristics.

Although it “is a violation of the equal protection clause to strike even one black juror if the strike was made for racial reasons,” it is important to note that the number of peremptory challenges used against members of a particular race may not, in itself, be enough to establish a prima facie case. Because the number of strikes “takes on meaning only in the context of other information such as the racial composition of the venire, the race of others struck by the prosecution, or the voir dire answers of those who were struck compared to the answers of those who were not struck,” it is imperative that counsel create an adequate record. Likewise, because the courts have not addressed all of the circumstances.
scenarios in which a prima facie case will be established, defense counsel must continue to be creative and assert as many bases for the *Batson* violation as possible.

C. Addressing the Prosecutor’s Proffered Explanations

Along with creating an adequate record, defense counsel should aggressively attack any reason the Commonwealth produces that counsel suspects is pretextual. In this area, other states’ courts have been more willing than Virginia’s to question the prosecutor’s offered motive. Although citing the opinions of other states’ courts will never be as convincing to Virginia trial judges as citation to Virginia opinions, as we have seen, there are few Virginia opinions which go beyond a cursory examination of whether the prosecutor’s reasons are facially race-neutral. Virginia counsel might want to gently remind the court that *Batson* is a federal constitutional issue, not a state issue, and so the interpretations of other courts of *Batson* issues are relevant. Likewise, the criminal defense community may sometimes need to remind itself that most Virginia trial judges are fair-minded individuals who will consider the proffered reasoning of other courts if it is persuasive. Because of the wide discretion given trial judges on jury issues, *Batson* claims are not just a *stare decisis* game. With that in mind, we now examine how other jurisdictions have evaluated facially race-neutral reasons to find that they are in fact pretextual.

1. Age

Although Virginia courts have repeatedly held that age is a race-neutral reason to strike a juror, other jurisdictions have been more suspicious than the Virginia courts of the prosecutor’s motives when such reasons are proffered. No court, however, has held that age is a suspect classification or that it is always an irrelevant factor in striking a juror. Other courts have just been more willing to question whether “age” is being used as a substitute for “race.” They have required that prosecutors make some connection between the case being tried and the juror’s age, and of course, that the age criteria is being equally applied to white venirepersons as well as to black ones.

2. Employment/Occupation

Prosecutors frequently use a person’s occupation or lack of employment as their race-neutral reason for striking a juror. Although no court has ruled that occupation is a suspect class or that it is *per se* pretextual, defense counsel should make trial judges closely examine such reasons to ensure they are not pretextual. Prosecutors should not be allowed to simply state that they struck a juror because of his occupation; they should be required to state some plausible connection between the juror’s occupation and the case being tried. The prosecution should offer some reason that the occupation is relevant, such as that it suggests bias on the part of the juror. Further, if the prosecution’s explanation of the connection between the occupation and the presumed bias is irrational, or based on stereotypes, defense counsel should object on the record that the proffered reason is pretextual.

For example, in an Alabama case, the prosecutor claimed that he had struck a black juror because he was a teacher and teachers are more forgiving than other people. In *Powell v. State*, the Alabama Court of Criminal Appeals rejected that argument because the prosecutor had failed to show that the particular juror was more forgiving or was biased in any other way. Likewise, in a California case, the court could find no connection between a juror’s job as a hospital administrator and a supposed bias against the prosecution. In the same case, the prosecution struck another juror because his job as a truck driver showed a lack of intelligence. The court rejected this argument as well, pointing out that the juror handled the voir dire questions as well as any other juror. Thus, even though occupation is generally a race-neutral reason, defense counsel should always force the prosecution to state on the record why the juror’s job is relevant to the case at hand. If the connection is irrelevant or based on stereotypes, or if there is an insufficient factual basis for it, counsel should move that the trial judge find the reason pretextual.

3. Marital Status, Parental Status, and Relationship to Persons Charged with Crime

If a juror is struck from the panel because he or she is unmarried or childless, again the best course of conduct is to force the prosecution to state the connection between the juror’s family status and the case to be tried. For instance in *Givens v. State*, the Florida Court of Appeals found that the prosecution had failed to draw an adequate connection between the facts of the case and the fact that the juror was single and a non-homeowner. And as with all race-neutral reasons, defense counsel should make certain that the prosecution has applied the exclusionary criteria in an even-handed fashion.

When the prosecutor strikes a juror because he is related to or knows someone who has been charged with a crime, again the defense counsel’s primary weapon of attack should be relevancy. The prosecutor should first have to establish that the juror is in fact related, or friends with, a person charged with a crime. Mere allegations should not be accepted.

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102 *Floyd v. State*, 590 So.2d 357 (Ala. Crim. App. 1988) (finding that while age could be relevant in case, it was doubtful on the facts since the prosecutor did not inquire into age-based bias); *State v. Butler*, 731 S.W.2d 265 (Mo. Ct. App. 1987) (finding that proffered link between old age and predisposition to intimidation was not shown); *Chivers v. State*, 796 S.W.2d 539 (Tex. Crim. App. 1990) (rejecting reason that 35-year-old juror was too young, without explanation as to why, reason was insufficiently specific).
107 Id.
109 Id.
110 *State v. Hope*, 589 S.E.2d 503 (III. 1992) (reversing where state allegedly struck blacks on basis of marital status but same characteristics present in white jurors).
111 See *Andrews v. State*, 624 So.2d 1095 (Ala. Crim. App. 1993) (finding reason insufficient where prosecutor was not sure whether prospective juror’s husband was father of man he had prosecuted); *Jackson v. State*, 594 So.2d 1289 (Ala. Crim. App. 1991) (rejecting reason where prosecutor struck black juror because she worked at company where several people had been prosecuted but prosecutor never asked juror if she knew those people). See also *United States v. Díaz*, 16
Once a relationship has been established, the prosecutor should be forced to show whether it will bias the juror in the particular case.\footnote{112}

4. Neighborhood

Because blacks in this country often live in \textit{de facto} segregated neighborhoods, when jurors are struck based on where they live, courts should be extremely suspicious. Such reasons fairly scream "pretextual." Despite this truth, exclusions based on neighborhood are routinely allowed. Defense counsel should object and force prosecutors to articulate race-neutral reasons for such strikes. Often the reason will turn out to be nothing more than a rationalization of a racial stereotype. An often heard rationale is simply that the juror lives in a high-crime neighborhood. The prosecutor should be forced to explain exactly why that fact is relevant. One explanation is that people in such neighborhoods do not like police, but absent a showing that the particular juror is one of those people who do no like police, such reasons should be rejected.\footnote{113} Another explanation is that people in high-crime neighborhoods are inured to violence. The Ninth Circuit rejected that argument in \textit{United States v. Bishop},\footnote{114} finding that it led to using residence as a "surrogate for racial stereotypes."\footnote{115} The court might also be reminded that those who live in "high crime" neighborhoods are by definition more likely to be victims of crime, hardly a rational basis for a challenge by the prosecution.

D. Basic Tactics for Revealing a Batson Violation

By way of review, there are four basic tactics for combating a suspected \textit{Batson} violation at the trial level. First, make sure a complete record is created, not only for purposes of appeal, but to force the prosecution and the trial judge to articulate constitutional reasons for the prosecutor's strikes.\footnote{116} Second, question the relevance of the prosecutor's "race-neutral reason" to the case to be tried. There must be some connection between the proffered reason and potential bias.\footnote{117} Third, look for disparate treatment between the jurors who were struck and the jurors who were not struck. If black jurors were struck because of their neighborhood, but white jurors from comparable neighborhoods were not struck, that is strong evidence of pretext. Finally, look for a lack of support in the record for the prosecutor's proffered reason.\footnote{118} This most often will occur when the prosecutor strikes a juror for a reason about which he did not even question the juror in voir dire.\footnote{119} (This strategy may also provide an opportunity to request an evidentiary hearing). Such a lack of support in the record leaves the defendant's case unrebutted and therefore exposes a \textit{Batson} violation.

V. CONCLUSION

The current state of \textit{Batson} jurisprudence in Virginia is not particularly encouraging to defense attorneys. However, these circumstances may be due in part to lack of aggressiveness and creativity in pursuing such claims. It should be remembered that \textit{Batson} is more than a trial tactic or gimmick; it is an important safeguard of a defendant's civil liberties and of the civil liberties of us all. As Stephen Bright has written, "[w]hen a prosecutor uses the overwhelming majority of his jury strikes against a racial minority, that minority is prohibited from participating in the process. A jury does not represent 'the conscience of the community on the ultimate question of life or death' when [a large proportion] of the community is not represented on it."\footnote{120} It is not a pleasant thing to litigate aggressively a claim that one's adversary is intentionally attempting to deny citizens the right to serve on a jury because of their race. But it is often necessary to do so, because, in fact, it happens more often than we would like to admit.\footnote{121}

\footnote{119} \textit{Ex parte Branch}, 526 So.2d 609 (Ala. 1987) (holding that lack of meaningful questions is evidence of intent to discriminate); \textit{Garrett v. Morris}, 815 F.2d 509 (8th Cir. 1987) (rejecting prosecutor's proffer that he struck black jurors due to their limited education or ability to follow instructions); \textit{Swain v. Alabama}, 380 U.S. 199 (1965) (rejecting prosecutor's proffer that he struck black jurors due to their aggressiveness).\footnote{120} \textit{Stephen S. Bright, Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty}, 35 Santa Clara L. R. 433, 457 (1995) (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 (1968)).

\footnote{121} See Id., noting that the death penalty is disproportionately applied to blacks, especially those that murder whites, and discussing capital cases in which attorneys, judges or jurors referred to black defendants as "niggers," but no reversible error was found. \textit{Id.} at 445-47, citing \textit{Dobbs v. Zant}, 720 F. Supp. 1566 (N.D. Ga. 1989); \textit{Peek v. Florida}, 488 So. 2d 52 (Fla. 1986).